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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Jorge Antonio Ramirez,
10 Petitioner,

11 v.

12 Ryan Thornell, et al.,
13 Respondents.
14

No. CV-23-00114-TUC-JGZ (BGM)

REPORT AND RECOMMENDATION

15 Before the Court is Petitioner Jorge Ramirez's Petition for Writ of Habeas Corpus
16 by a Person in State Custody Under 28 U.S.C. § 2254. (Doc. 1.) Under Local Rules of
17 Civil Procedure 3.7, 72.1, and 72.2, this matter was referred to Magistrate Judge Bruce
18 G. Macdonald for a Report and Recommendation. (Doc. 3.) The Magistrate Judge
19 recommends that the District Court deny the petition and dismiss this case.

20 **BACKGROUND¹**

21 In April 2017, a Cochise County Detective was investigating a series of burglaries
22 committed in the areas of Hereford and Palominas, Arizona, including the theft of a farm
23 tractor that occurred in 2016. *State v. Ramirez*, No. 2 CA-CR 2018-0356, 2019 WL
24 6608757, at *1 (Ariz. Ct. App. Dec. 5, 2019). The tractor was stolen from a couple who
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26 ¹ The Court adopts the facts as recited by the Arizona Court of Appeals in two of its
27 opinions. Because the facts are taken from the state appellate court's decisions, they are
28 afforded a presumption of correctness that may be rebutted only by clear and convincing
evidence. *See* 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007).
Ramirez fails to challenge these facts.

1 purchased it in 2006 for approximately \$25,550. *Id.* ¶ 3. During the investigation, the
2 detective interviewed a young female who admitted to stealing the tractor with her
3 boyfriend, Matthew Mullins. *Id.* Mullins testified at trial that he was contacted by a local
4 man named John, who asked Mullins to steal a tractor with a bucket on the front in
5 exchange for a combination of drugs and money. *Id.* Mullins knew where he could find
6 such a tractor. *Id.*

7 According to Mullins, when he took the tractor, it was painted blue and in good
8 condition. *Id.* ¶ 4. After using a “pick key” for the ignition, Mullins and his girlfriend stole
9 the tractor and drove it ten to fifteen miles to John’s house the same night. *Id.* Mullins
10 testified that John gave him \$300 and an ounce of methamphetamine for the tractor. *Id.*
11 Mullins denied painting the tractor. *Id.*

12 The detective interviewed a number of individuals to determine the location of the
13 tractor during the course of his investigation. *Id.* ¶ 5. Through these interviews, he received
14 information that the tractor was at Jorge Ramirez’s residence. *Id.* After securing a search
15 warrant, officers located the tractor behind a shed in Ramirez’s backyard. *Id.* The tractor’s
16 serial number matched that of the tractor stolen in 2016. *Id.*

17 Before the tractor was stolen, it had a keyed ignition and a blue paint job with white
18 wheel rims. *Id.* ¶ 6. When police found the tractor, it had been painted green, although its
19 underbody and area under the hood were still blue. *Id.* The tractor’s rims had been painted
20 yellow and there was a toggle switch where the keyed ignition would have been. *Id.* The
21 headlights, as well as the manufacturer and dealer plates and decals, including the plate
22 bearing its serial number, were also painted green. *Id.*

23 Ramirez was interviewed by the detective after police found the tractor on his
24 property. *Id.* ¶ 7. Although Ramirez knew John and that John had a reputation for dealing
25 in stolen property,² he denied knowing that the tractor was stolen and instead claimed that
26 he bought the tractor from John. *Id.* Ramirez said that he paid \$1,500 for the tractor along
27 with trading a riding lawnmower. *Id.* Ramirez stated that he did not receive a title for the

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² In fact, Ramirez consistently referred to John as “Con John,” John’s nickname.

1 tractor but that he did receive a bill of sale from John. *Id.* Police officers failed to find a
2 bill of sale after searching Ramirez's home, and neither side produced one at trial. *Id.*
3 Ramirez admitted that he installed a toggle switch in place of the keyed ignition because
4 the key did not work. *Id.* Although he believed that the key did not work because someone
5 may have tried to steal the tractor, Ramirez informed the detective that he never made any
6 effort to determine whether the tractor was actually stolen. *Id.*

7 At trial, John's testimony contradicted the testimony of Mullins and his girlfriend
8 and the statements that Ramirez had made to the detective. 2019 WL 6608757, at *2. John
9 denied that he told Mullins to steal the tractor, testified that the tractor had already been
10 painted green when Mullins brought it to him, and stated that Mullins and his girlfriend
11 told him the tractor was from the girlfriend's brother-in-law. *Id.* ¶ 8. John also testified
12 that Mullins first brought him the tractor one morning wanting to sell it, but that he told
13 Mullins that he did not have the amount of money to buy it. *Id.* According to John, Mullins
14 asked him to take the tractor to Ramirez to see if he would be interested in buying it. *Id.*
15 John testified that Mullins and his girlfriend were asking between \$3,000 and \$4,000 for
16 the tractor. *Id.*

17 John had known Ramirez for ten years and lived a block away from him. *Id.* ¶ 9.
18 John testified that he brought the tractor to Ramirez the same day that Mullins delivered it
19 to him. *Id.* According to John, the tractor was in decent condition and had no mechanical
20 issues. *Id.* Although Mullins and his girlfriend were seeking \$3,000 to \$4,000 for the
21 tractor, John said that Ramirez had only given him \$500 to give to the pair and said that
22 they were going to work out the rest. *Id.*

23 After the prosecution rested its case, Ramirez moved for a judgment of acquittal,
24 arguing that there was insufficient evidence to prove that he either knew or should have
25 known that the tractor was stolen. *Id.* ¶ 10. The court denied the motion, ruling that there
26 was substantial evidence to allow the issue to go to the jury. *Id.* The jury subsequently
27 found Ramirez guilty of theft of a means of transportation, and the court sentenced him to
28 a term of 11.25 years' imprisonment. *Id.* ¶ 1 at *1.

1 In April 2017, long before he was convicted in the tractor case, law enforcement
2 officers discovered illegal drugs and drug paraphernalia in Ramirez's residence during the
3 execution of two search warrants. *State v. Ramirez*, No. 2 CA-CR 2018-0355, 2020 WL
4 104331, at *1 (Ariz. Ct. App. Jan. 8, 2020). The first warrant authorized officers to search
5 the premises for evidence related to a stolen tractor. *Id.* at ¶ 2. However, while searching
6 Ramirez's house, officers saw methamphetamine and drug paraphernalia in plain view on
7 his kitchen table. *Id.* This lead officers to obtain a second search warrant allowing them
8 to search for illegal drugs and drug paraphernalia. *Id.* A jury trial ensued, with the jury
9 finding Ramirez guilty of multiple drug-related offenses. *Id.* ¶ 3. For his drug convictions,
10 Ramirez was sentenced to concurrent terms of imprisonment, the longest of which was
11 15.75 years. *Id.*

12 PROCEDURAL HISTORY

13 Tractor Conviction (CR 2017-00343) and Direct Appeal

14 On October 24, 2018, Ramirez was convicted of theft of a means of transportation,
15 a class 3 felony. (Docs. 1-1 at 81; 10-1 at 33.) He was sentenced to 11.25 years in prison.
16 (Doc. 1-1 at 81.) Ramirez filed a direct appeal, in which he argued that the trial court erred
17 when it denied his motion for a judgment of acquittal and that the jury's verdict was not
18 supported by the evidence. (*Id.*) On December 5, 2019, the Arizona Court of Appeals
19 affirmed Ramirez's conviction and sentence in a memorandum decision. *See Ramirez*,
20 2019 WL 6608757, at *3.

21 Drug Conviction (CR 2017-00384) and Direct Appeal

22 On November 13, 2018, Ramirez was convicted of possession of drug
23 paraphernalia, a class 6 felony, possession of methamphetamine for sale, a class 2 felony,
24 and possession of marijuana, a class 6 felony. (Docs. 1-1 at 81; 10-1 at 101-02.) He was
25 sentenced to concurrent prison sentences, with the longest term being 15.75 years. (Doc.
26 1-1 at 81.) Ramirez's concurrent sentences were to run consecutive to the 11.25-year
27 sentence on his tractor conviction. (Doc. 10-1 at 43.) Ramirez filed a direct appeal, in
28 which he argued that the warrants authorizing searches of his residence were not supported

1 by probable cause and were improperly executed, and, therefore, the trial court erred when
2 it denied his motion to suppress. (*Id.*) On January 8, 2020, the Arizona Court of Appeals
3 affirmed Ramirez’s convictions and sentences in a memorandum decision. *See Ramirez*,
4 2020 WL 104331, at *3.

5 Rule 32 Petition for Post-Conviction Relief

6 On March 4, 2021, Ramirez filed a Petition for Post-Conviction Relief (“PCR
7 Petition”) under Arizona Rule of Criminal Procedure 32. (Doc. 10-2 at 85-101.) His PCR
8 Petition was based on claims that his trial attorney provided ineffective assistance of
9 counsel during both his cases and that the prosecutor engaged in misconduct during his
10 tractor trial by introducing perjured testimony. (*Id.* at 90-100.) To show ineffective
11 assistance, Ramirez argued that his attorney (i) wrongly urged him to reject a plea offer
12 and take both cases to trial; (ii) was unable to competently represent him due to an alleged
13 alcohol problem; and (iii) failed to impeach a key witness during his tractor trial, which
14 resulted in Ramirez losing credibility with the jury. (*Id.* at 90-96.) Ramirez also argued
15 that the prosecution elicited false testimony and deliberately left the jury with the false
16 impression that one of the witnesses testified without the benefit of a favorable plea
17 agreement. (*Id.* at 96-100.) Ramirez requested that the court vacate his convictions and
18 reinstate the original plea offer from his drug case. (*Id.* at 101.)

19 On July 7, 2021, the court determined that Ramirez raised one or more colorable
20 claims of ineffective assistance of counsel and granted him an evidentiary hearing on those
21 claims. (Doc. 10-2 at 116, 118.) The court ruled that the prosecution did not elicit false
22 testimony at Ramirez’s tractor trial because the witness it questioned answered truthfully
23 when he testified that he did not receive any benefit in exchange for his testimony. (*Id.* at
24 117.) At the time the witness testified, the witness had already been sentenced on the
25 charges that were referenced in his plea agreement, and the court ruled that he was under
26 no obligation to testify. (*Id.*) The court also observed that the jury was informed that the
27 witness had been convicted of a crime for his involvement in the case. (*Id.*)

28 PCR Evidentiary Hearing

1 On August 19, 2021, the PCR court conducted the first segment of its two-part
2 evidentiary hearing on Ramirez's ineffective assistance claims. (*See* Doc. 10-2 at 122-23.)
3 The court heard testimony from Ramirez's trial attorney, Ramirez's mother, a former boss
4 of Ramirez's trial attorney, and Ramirez. (*Id.* at 122-23; 125-204.) On September 2, 2021,
5 the court conducted the second segment of its evidentiary hearing. (Doc. 10-3 at 3-5.) It
6 heard testimony from a different former trial attorney of Ramirez, Ramirez, Ramirez's
7 former girlfriend, three of Ramirez's brothers, and a court reporter. (*Id.* at 7-68.)

8 On October 15, 2021, the court issued its ruling on Ramirez's PCR Petition. (Doc.
9 10-3 at 85-93.) In denying the petition, the court ruled that Ramirez failed to demonstrate
10 that he was subject to ineffective assistance of counsel. (*Id.* at 91-93.) The court concluded
11 that Ramirez failed to establish that his attorney's courtroom performance was impaired by
12 alcohol; that he suffered prejudice due to his attorney's alleged failure to impeach a witness
13 at trial; and that his attorney hid facts from him, or gave him incorrect legal advice, or
14 otherwise prevented him from taking a plea offer. (*Id.* at 91-92.) The court was also
15 unconvinced that Ramirez's attorney used the word "guarantee" when discussing
16 Ramirez's chances of success on the tractor case. (*Id.* at 92.)

17 Petition for Review

18 On November 9, 2021, Ramirez petitioned the Arizona Court of Appeals to review
19 the denial of his PCR Petition. (Doc. 10-3 at 95-104.) In his Petition for Review, Ramirez
20 claimed that his trial attorney promised and guaranteed him that he would win his tractor
21 case and that, thereafter, his drug case would simply "go away." (*Id.* at 99.) He also argued
22 that the PCR court abused its discretion by rejecting as hearsay testimony from his family
23 and girlfriend about these promises. (*Id.* at 99-101.) Ramirez argued that the court also
24 abused its discretion by crediting the testimony of his attorney and by refusing to take
25 judicial notice of matters in which unrelated defendants raised concerns about the same
26 lawyer. (*Id.* at 101-03.)

27 On March 9, 2022, the Arizona Court of Appeals denied Ramirez's Petition for
28 Review. (*Id.* at 119-20.) In denying the petition, the court observed that multiple hearsay

objections were sustained and overruled by the PCR court and that the statements objected to varied widely. *State v. Ramirez*, No. 2 CA-CR 2021-0101-PR, 2022 WL 703665, at *1 (Ariz. Ct. App. Mar. 9, 2022). The court ruled that Ramirez’s hearsay objections were waived because he neglected to direct the court to specific testimony or rulings by the PCR court to which he objected. *Id.* ¶ 5. The court also concluded that judicial notice extends to indisputable facts “from sources whose accuracy cannot reasonably be questioned,” and that claims raised by other defendants in unadjudicated proceedings failed to meet that standard. *Id.* ¶¶ 6-7 at *2. The court declined Ramirez’s request to reweigh the evidence, finding that the trial court was the sole arbiter of witness credibility and that its ruling was supported by substantial evidence. *Id.* ¶ 8. On May 20, 2022, the court issued its mandate relinquishing jurisdiction over the matter. (Doc. 10-3 at 122-23.)

Federal Habeas Corpus Petition

On March 8, 2023, Ramirez filed the federal habeas corpus petition at hand. (Doc. 1.) In the petition, Ramirez argues that he suffered various forms of ineffective assistance of counsel and that the PCR court abused its discretion by refusing to accept testimony from his family and girlfriend concerning promises made to him by his attorney. (*Id.* at 15-38.) The petition has been fully briefed. (*See* Docs. 1, 10, 13.) This Report and Recommendation follows.

LEGAL STANDARD

Federal district courts are instructed to entertain habeas applications on behalf of persons in custody pursuant to state court judgments “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A petition for habeas corpus by a person in state custody:

[S]hall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

1 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

2 A decision involves an unreasonable application of clearly established federal law
 3 if it “identifies the correct governing legal principle but unreasonably applies that principle
 4 to the facts of the prisoner's case.” *Vega v. Ryan*, 757 F.3d 960, 965 (9th Cir. 2014)
 5 (cleaned up). Under the reasonable determination clause, a state court’s factual finding is
 6 not unreasonable simply because the federal habeas court reaches a different conclusion.
 7 *Id.* Instead, courts are to presume that the state court’s factual findings are correct unless
 8 the petitioner “rebutts the presumption of correctness by clear and convincing evidence.”
 9 *Id.* In any case, “[a] state court's determination that a claim lacks merit precludes federal
 10 habeas relief so long as fairminded jurists could disagree on the correctness of the state
 11 court's decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (cleaned up). In
 12 analyzing a § 2254 petition, review is limited to the record that was before the state court
 13 that adjudicated the merits of the claim. *Pinholster*, 563 U.S. at 181.

14 DISCUSSION

15 Ramirez brings the petition at hand raising two claims for relief. (Doc. 1 at 15-40.)
 16 Ramirez argues that he was the victim of ineffective assistance of trial counsel (*id.* at 15-
 17 33) and that the trial court abused its discretion by refusing to accept testimony from his
 18 family and girlfriend at the PCR evidentiary hearing (*id.* at 33-38). The Court addresses
 19 these arguments in the order in which they are raised in Ramirez’s petition.

20 I. Ineffective Assistance of Counsel

21 As it concerns federal habeas claims of ineffective assistance of counsel, relief may
 22 be granted only if the last reasoned state-court decision unreasonably applied the general
 23 ineffective assistance standard established by *Strickland v. Washington*, 466 U.S. 668
 24 (1984). *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *see also Barker v. Fleming*,
 25 423 F.3d 1085, 1091 (9th Cir. 2005) (“When more than one state court has adjudicated a
 26 claim, we analyze the last reasoned decision.”). Here, the Arizona Court of Appeals
 27 summarily affirmed the PCR court’s denial of Ramirez’s ineffective assistance claims. *See*
 28 *Ramirez*, 2022 WL 703665, at *2, ¶ 8 (“The remainder of Ramirez's arguments amount to

1 a request for this court to reweigh the evidence presented at the hearing. . . We will not
 2 reweigh the evidence presented and, because the court's ruling is supported by substantial
 3 evidence in the record, we must affirm.”). As such, the last reasoned state-court decision
 4 is the PCR court’s order denying Ramirez’s ineffective assistance claims. *See Spreitz v.*
 5 *Ryan*, 916 F.3d 1262, 1272 (9th Cir. 2019) (analyzing the PCR court’s decision where the
 6 Arizona Supreme Court summarily affirmed the PCR court’s merits determination on the
 7 petitioner’s *Eddings* claims); *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014) (“When
 8 a state court does not explain the reason for its decision, we “look through” to the last state-
 9 court decision that provides a reasoned explanation capable of review.”).

10 Since the PCR court’s order on Ramirez’s request for post-conviction relief is the
 11 last reasoned state-court decision on the ineffective assistance issue, the Court must
 12 determine whether the order demonstrates that the court unreasonably applied *Strickland*
 13 to the facts of Ramirez’s case. *See Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014)
 14 (“AEDPA³ requires that a federal court find the state court's ... conclusions are objectively
 15 unreasonable before granting habeas relief.”). “This is a difficult to meet and highly
 16 deferential standard for evaluating state-court rulings, which demands that state-court
 17 decisions be given the benefit of the doubt.” *Pinholster*, 563 U.S. at 181 (cleaned up). If
 18 the state-court decision identifies the correct governing legal principle in existence at the
 19 time, it is the defendant’s burden to prove that the decision unreasonably applied that
 20 principle to the facts of his case. *Id.* at 181-82. Where ineffective assistance is alleged in
 21 a post-AEDPA federal habeas case, a court’s review is “doubly deferential.” *Mirzayance*,
 22 556 U.S. at 123.

23 **A. Insufficient Pretrial Investigation Claim Procedurally Barred**

24 As a preliminary matter, the Court notes that Ramirez includes four subheadings
 25

26 ³ AEDPA stands for the “Antiterrorism and Effective Death Penalty Act of 1996.”
 27 *Mirzayance*, 556 US. At 121. “Inspired by principles of comity, finality and federalism,
 28 AEDPA establishes a highly deferential standard for reviewing state court determinations.”
Lambert v. Blodgett, 393 F.3d 943, 965 (9th Cir. 2004).

1 under the ineffective assistance of counsel claim in his habeas petition. (*See* Doc. 1 at 17,
 2 20, 23, and 27.) The Court interprets these subheadings as separate permutations of
 3 ineffective assistance, only three of which are cognizable. To the extent that Ramirez
 4 argues that his trial attorney was ineffective for failing to conduct a pretrial investigation
 5 (*see id.* at 17-19), this claim is unexhausted and barred from review.⁴

6 To satisfy the exhaustion requirement, habeas petitioners must “fairly present
 7 federal claims to the state courts in order to give the State the opportunity to pass upon and
 8 correct alleged violations of its prisoners' federal rights.” *Duncan v. Henry*, 513 U.S. 364,
 9 365 (1995) (cleaned up). To fairly present a federal claim, “a petitioner must present the
 10 substance of his claim to the state courts, including a reference to a federal constitutional
 11 guarantee and a statement of facts that entitle the petitioner to relief.” *Gulbrandson v.*
 12 *Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (cleaned up). While “the complete exhaustion
 13 rule is not [intended] to trap the unwary *pro se* prisoner,” *Slack v. McDaniel*, 529 U.S. 473,
 14 487 (2000) (cleaned up), it “does not mean ... that a petitioner who presented any
 15 ineffective assistance of counsel claim ... can later add unrelated alleged instances of
 16 counsel's ineffectiveness to his claim,” *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th
 17 Cir. 2005).

18 Ramirez failed to present his insufficient pretrial investigation ineffective assistance
 19 claim to the Arizona Court of Appeals, and if he were granted leave to do so now, the court
 20 would find that his claim is procedurally barred. *See Beaty v. Stewart*, 303 F.3d 975, 987
 21 (9th Cir. 2002) (cleaned up) (“A claim is procedurally defaulted if the petitioner failed to
 22 exhaust state remedies and the court to which the petitioner would be required to present
 23

24 ⁴ To the extent that Ramirez invites the Court to reject *Strickland*'s presumption of
 25 reasonableness when analyzing his attorney's performance, the Court declines to do so.
 26 “The burden of rebutting this presumption rests squarely on the defendant, and it should
 27 go without saying that the absence of evidence cannot overcome it.” *Dunn v. Reeves*, 141
 28 S. Ct. 2405, 2410 (2021) (cleaned up). “In fact, even if there is reason to think that
 counsel's conduct was far from exemplary, a court still may not grant relief if the record
 does not reveal that counsel took an approach that no competent lawyer would have
 chosen.” *Id.* (cleaned up). Ramirez fails to meet this standard.

1 his claims in order to meet the exhaustion requirement would now find the claims
 2 procedurally barred.”); Ariz. R. Crim. P. 32.2(a)(3) (precluding relief based on any ground
 3 “waived at trial or on appeal, or in any previous post-conviction proceeding”). As such,
 4 the Court finds this claim to be procedurally defaulted and recommends that it be denied.

5 **B. *Strickland* Applied Reasonably to Incompetent Advice Claim**

6 Criminal defendants have a Sixth Amendment right to competent counsel, and that
 7 right extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).
 8 *Strickland*’s deficient performance and prejudice test applies to instances where ineffective
 9 assistance results in rejection of a plea offer and the defendant’s conviction at the ensuing
 10 trial. *Id.* at 163. To demonstrate deficient performance, a defendant must show that
 11 “counsel’s representation fell below an objective standard of reasonableness.” *Lafler*, 566
 12 U.S. at 163 (quoting *Strickland*, 466 U.S. at 688). The performance prong is reviewed
 13 considering all of the circumstances. *Strickland*, 466 U.S. at 688. To demonstrate
 14 prejudice, a defendant must show that “but for the ineffective advice of counsel there is a
 15 reasonable probability that the plea offer would have been presented to the court ... the
 16 court would have accepted its terms, and that the conviction or sentence, or both, under the
 17 offer’s terms would have been less severe than under the judgment and sentence that in fact
 18 were imposed.” *Lafler*, 566 U.S. at 164.

19 Ramirez argues that his attorney provided ineffective assistance because he
 20 repeatedly promised and guaranteed that Ramirez would win his tractor case at trial and
 21 that, thereafter, his drug case would go away. (Doc. 1 at 20.) Ramirez contends that by
 22 making these assurances his attorney discouraged him from accepting a favorable plea
 23 offer. (*Id.*) Ramirez adds that his attorney’s promises were often witnessed by members
 24 of his family and his girlfriend. (*Id.*) He also states that the statements were reported in
 25 affidavits attached to his petition for postconviction relief. (*Id.*)

26 The PCR court addressed these arguments during its evidentiary hearing and in its
 27 order denying Ramirez’s petition for postconviction relief. (*See* Docs. 10-2 at 125-203;
 28 10-3 at 7-68, 85-93.) At the hearing, Ramirez’s attorney testified that Ramirez was not

1 interested in taking any plea offer that entailed prison time. (Doc. 10-2 at 134.) He also
2 testified that he thought that the tractor case “was much more contestable” than the drug
3 case, but that he never promised Ramirez an acquittal on either case. (*Id.* at 135, 137.)
4 Ramirez’s trial attorney denied telling Ramirez that depending on the results of the tractor
5 case, the drug case would go away. (*Id.* at 137.)

6 There is nothing in the record nor the court’s order that demonstrates that the PCR
7 court unreasonably applied *Strickland* to Ramirez’s wrongful advice ineffective assistance
8 claim. In its order, the court summarized the admissible evidence presented at the hearing
9 and identified *Strickland* as the relevant rule-making authority for analyzing ineffective
10 assistance claims. (Doc. 10-3 at 88-90.) The court then determined that Ramirez was
11 entitled to competent counsel during the plea-bargaining process and offered an analogous
12 Supreme Court case that addressed ineffective assistance claims in the plea-bargaining
13 process. (*Id.* at 90.) Only after hearing testimony from Ramirez, Ramirez’s mother, three
14 of Ramirez’s brothers, Ramirez’s former girlfriend, two of Ramirez’s former attorneys, a
15 former boss of Ramirez’s trial attorney, and a court reporter, did the court determine that
16 Ramirez’s attorney did not use the word “guarantee” when discussing with Ramirez’s his
17 chances of success at trial. (*Id.* at 92.)

18 The court gave no weight to the testimony from Ramirez and his family members
19 that Ramirez took plea offers in all of his prior criminal cases. (*Id.*) According to the court,
20 the testimony failed to demonstrate that Ramirez was willing to take a plea offer that
21 included mandatory prison time, and it also failed to show that his attorney’s alleged bad
22 advice was the sole reason that Ramirez rejected the prosecution’s plea offer. (*Id.*) The
23 court recalled that both of Ramirez’s former trial attorneys testified that Ramirez had a
24 good defense in the tractor case and that Ramirez testified that he went to trial based on the
25 advice of both men. (*Id.*) The court distinguished Ramirez’s case from the incorrect legal
26 advice that was given to the defendant in *Lafler v. Cooper*, 566 U.S. 156, 161-62 (2012),
27 and concluded that Ramirez was only given his attorney’s opinion, which he was free to
28 accept or deny. (*Id.* at 92-93.) Accordingly, the PCR court did not unreasonably apply

1 *Strickland* to Ramirez’s wrongful advice ineffective assistance of counsel claim, and the
 2 Court recommends that this claim be denied.

3 **C. *Strickland* Applied Reasonably to Failure to Impeach Claim**

4 Ramirez next argues that his attorney provided ineffective assistance because he
 5 failed to impeach a witness in Ramirez’s tractor case with evidence that the witness was
 6 testifying in exchange for a favorable plea agreement. (Doc. 1 at 23-27.) That witness was
 7 Matthew Mullins. (*Id.*) To demonstrate ineffective assistance for the failure to impeach
 8 or cross examine a witness, “the defendant must overcome the presumption that, under the
 9 circumstances, the challenged action might be considered sound trial strategy.” *Matylinsky*
 10 *v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009) (cleaned up). To do so, he must “identify
 11 the acts or omissions of counsel that are alleged not to have been the result of reasonable
 12 professional judgment.” *Id.* (quoting *Strickland*, 466 U.S. at 690). “The court must then
 13 consider whether those acts or omissions deviated from prevailing professional norms.”
 14 *Id.* at 1092 (cleaned up). “Even then, counsel is strongly presumed to have rendered
 15 adequate assistance and made all significant decisions in the exercise of reasonable
 16 professional judgment.” *Id.* (cleaned up).

17 Ramirez fails to meet the heavy burden of demonstrating ineffective assistance with
 18 this claim. At the PCR hearing, Ramirez’s attorney testified, at length, about his decision
 19 not to impeach or cross-examine Mullins about his plea agreement at trial. (*See* Doc. 10-
 20 2 at 137-140.) The attorney testified that he was aware that Mullins was obligated to testify
 21 at trial because of a plea agreement, that he intended to address the agreement during trial,
 22 and that he chose not to impeach Mullins with the agreement because he believed Mullins
 23 testified truthfully and that Mullins’ testimony did not directly implicate Ramirez in the
 24 crime. (*Id.*) Notably, Ramirez’s PCR counsel failed to challenge these assertions during
 25 her cross-examination of the attorney at the evidentiary hearing. (*See id.* at 141-149.)

26 The PCR court reasonably addressed this ineffective assistance claim in its order
 27 denying Ramirez’s request for postconviction relief. (*See* Doc. 10-3 at 91-92.) The court
 28 replicated the relevant part of Mullins’ plea agreement in the order, noted that Mullins

1 testified truthfully about the agreement—including the fact that he was sentenced to
 2 probation and that his sentencing was months prior to testifying, determined that the
 3 attorney’s failure to impeach Mullins with the agreement was a matter of trial strategy, and
 4 concluded that matters of trial strategy could not form the basis of an ineffective assistance
 5 claim and that Ramirez failed to demonstrate that he suffered prejudice from his attorney’s
 6 failure to revisit facts that were already raised on direct examination. (*Id.*) While this
 7 Court may disagree whether matters of trial strategy may serve as a basis for ineffective
 8 assistance claims, it concludes that as an initial matter, Ramirez failed to demonstrate that
 9 his attorney performed deficiently by declining to impeach Mullins at trial. This is due to
 10 the fact that Ramirez failed to offer evidence at his evidentiary hearing demonstrating that
 11 the attorney’s decision was unreasonable or ineffective. Ramirez also failed to demonstrate
 12 prejudice, i.e., “a reasonable probability that, but for counsel’s unprofessional errors, the
 13 result of [his trial] would have been different.” *Strickland*, 466 U.S. at 694. Accordingly,
 14 the PCR court did not unreasonably apply *Strickland* to Ramirez’s failure to impeach
 15 ineffective assistance claim, and the Court recommends that this claim be denied.

16 **D. *Strickland* Applied Reasonably to Substance Abuse Claim**

17 Ramirez’s final ineffective assistance claim concerns his allegation that his trial
 18 attorney’s “alcohol problems impacted his ability to competently represent [Ramirez]
 19 during the course of this case.” (Doc. 1 at 28.) To succeed on an ineffective assistance
 20 claim premised on an attorney’s use of alcohol or drugs, “a petitioner must demonstrate
 21 that the attorney’s performance was deficient and that the deficiency prejudiced the
 22 petitioner.” *Bonin v. Vasquez*, 807 F. Supp. 589, 602 (C.D. Cal. 1992), *aff’d sub nom.*
 23 *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995).

24 Here, instead of arguing that the PCR court unreasonably applied *Strickland* to his
 25 ineffective assistance claim, or that the PCR court made an unreasonable determination
 26 concerning the claim, Ramirez argues that all of the aforementioned instances of ineffective
 27 assistance are causally connected to his attorney’s alleged abuse of alcohol. (Doc. 1 at 29-
 28 33.) This Court is prohibited from making *de novo* determinations on habeas review unless

1 certain preconditions are satisfied. *See Lambert v. Blodgett*, 393 F.3d 943, 971-72 (9th Cir.
2 2004) (cleaned up) (“[U]nder AEDPA, factual determinations by state courts are presumed
3 correct absent clear and convincing evidence to the contrary[;] and a decision adjudicated
4 on the merits in a state court and based on a factual determination will not be overturned
5 on factual grounds unless objectively unreasonable in light of the evidence presented in the
6 state-court proceeding”). Ramirez fails to satisfy either of these conditions.

7 At the PCR hearing, Ramirez testified that he smelled alcohol on his attorney’s
8 breath at the defense table in the morning and afternoons at the tractor trial and some
9 alcohol but less during his drug trial. (Doc. 10-2 at 188-89.) Ramirez also, however,
10 testified that he did not observe any indication that his attorney was under the influence
11 and he did not inform the trial judge about the smell of alcohol on his attorney’s breath.
12 (*Id.* at 189, 192.) Ramirez’s girlfriend testified that she witnessed the attorney drink from
13 a “shooter bottle” during a recess from Ramirez’s tractor trial, which she explained was a
14 three-to-four-inch liquor bottle sold at convenience stores. (Doc. 10-3 at 33, 40.) In
15 contrast to this testimony, Ramirez’s attorney testified that he was not intoxicated during
16 Ramirez’s trials nor had he drank alcohol before the trial started or during lunch. (Doc.
17 10-2 at 140.) A veteran court reporter, who worked both of Ramirez’s trials, also testified
18 that in his over twenty-five years of service, he had seen attorneys in the courtroom who
19 were under the influence of alcohol, but that he did not observe Ramirez’s attorney to be
20 under the influence during Ramirez’s trials. (Doc. 10-3 at 90.)

21 In the PCR court’s order denying Ramirez’s request for postconviction relief on this
22 claim, the court credited the testimony of Ramirez’s girlfriend that she saw the attorney
23 drinking from a suspicious bottle, but it concluded that the testimony failed to establish
24 that the attorney’s courtroom performance was impaired by alcohol. (*Id.* at 91.) The court
25 also found that no one testified that the attorney appeared to be under the influence during
26 trial and that the court reporter did not notice any impairment and apparently neither did
27 the trial judge. (*Id.*) The court recalled that Ramirez’s girlfriend said that the attorney
28 looked tired and unkept, but it concluded that a sloppy appearance did not equal ineffective

1 assistance of counsel. (*Id.*)

2 Ramirez fails to demonstrate that the PCR court unreasonably applied *Strickland* to
3 his substance abuse ineffective assistance claim. Additionally, the Court rejects Ramirez’s
4 argument that his attorney’s subsequent discipline and disbarment, on issues unrelated to
5 his representation of Ramirez at trial, contributed to his alleged ineffective assistance. (*See*
6 Doc. 1 at 38-40.); *United States v. Mouzin*, 785 F.2d 682, 698 (9th Cir. 1986) (“Neither
7 suspension nor disbarment invites a per se rule that continued representation in an ongoing
8 trial is constitutionally ineffective.”). Accordingly, the Court recommends that Ramirez’s
9 final ineffective assistance claim be denied.

10 **II. PCR Court’s Evidentiary Rulings Unreviewable**

11 In addition to arguing that his trial attorney provided ineffective assistance, Ramirez
12 contends that several of the PCR court’s evidentiary rulings also provide a basis for habeas
13 relief. (Doc. 1 at 33-38.) Specifically, Ramirez argues that the PCR court “abused its
14 discretion” when it: (i) determined that testimony from his family and friends about his
15 attorney’s alleged promises of trial success were inadmissible hearsay; (ii) credited the
16 testimony of Ramirez’s attorney that he did not promise or guarantee that Ramirez would
17 win at trial; (iii) refused to take judicial notice of two other matters in which other unrelated
18 defendants raised similar claims with the same attorney; and (iv) failed to consider the
19 evidence that was presented at the hearing in his favor. (*Id.*) The Arizona Attorney General
20 argues that these arguments are not cognizable on habeas review. (Doc. 10 at 11-12.) The
21 Court agrees.

22 “In conducting habeas review, a federal court is limited to deciding whether a
23 conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v.*
24 *McGuire*, 502 U.S. 62, 68 (1991). As such, the Supreme Court has reiterated that “federal
25 habeas corpus relief does not lie for errors of state law,” *id.* at 67, and the United States
26 Court of Appeals for the Ninth Circuit has similarly instructed that “a petition alleging
27 errors in the state post-conviction review process is not addressable through habeas corpus
28 proceedings,” *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989). On habeas corpus

1 review, federal courts lack jurisdiction to review state court applications of state procedural
2 rules. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1998).

3 Ramirez argues that faulty rulings during his evidentiary hearing lead the PCR court
4 to make the erroneous determination that his trial attorney did not make promises of
5 success at trial. (Doc. 1 at 38.) Ramirez then walks back this claim in his reply, conceding
6 that his arguments “are not central to the [p]etition, nor were they included to serve as
7 challenges to the PCR [c]ourt’s handling of [the] Rule 33 proceedings.” (Doc. 13 at 2.)
8 Ramirez goes on to state that the arguments merely provide a “procedural history of [his]
9 claims and demonstrate that he exhausted [the] claims by fairly presenting them to the State
10 courts.” (*Id.*) Ramirez then proclaims that his petition “concerns the denial of [his] Sixth
11 Amendment right to the effective assistance of counsel at trial,” and that “[i]rrespective of
12 whether the Court addresses the rulings of the PCR [c]ourt, it may address the underlying
13 IAC claim, which is a direct attack on the constitutionality of the detention.” (*Id.* at 5.)

14 Notwithstanding the fact that federal courts do not review state-court determinations
15 for an “abuse of discretion,” it is clear from the record that the PCR court made its
16 evidentiary rulings pursuant to Arizona law, which precludes this Court’s review. (*See*
17 Doc. 10-3 at 90 (ruling that the Arizona Rules of Evidence apply to hearsay objections at
18 Rule 32 evidentiary hearings).); *Ramirez*, 2022 WL 703665, at *2, ¶ 7 (ruling that Arizona
19 Rule of Evidence 201 applies to PCR evidentiary hearings and that Ramirez’s request to
20 take judicial notice of other matters did not meet the standard outlined in the Rule).
21 Accordingly, the Court determines that Ramirez’s abuse of discretion arguments, which
22 allege evidentiary errors by the state PCR court, are incognizable on habeas review; and it
23 recommends that the claims be dismissed and Ramirez’s petition denied.

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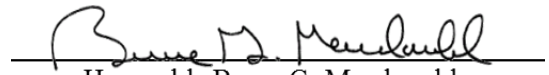
RECOMMENDATION

For the aforementioned reasons, the Magistrate Judge recommends that the District Court enter an order DENYING Ramirez's Petition for Writ of Habeas Corpus by a Person in State Custody Under 28 U.S.C. § 2254 (Doc. 1) and DISMISSING this case.

Pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), any party may serve and file written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. A party may respond to another party's objections within fourteen (14) days after being served with a copy. No replies shall be filed unless leave is granted by the District Judge. If objections are filed, the parties should use the following case number: **23-cv-114-JGZ**.

Failure to file timely objections to any factual or legal determination of the Magistrate Judge may result in waiver of the right of review.

Dated this 20th day of November, 2023.


Honorable Bruce G. Macdonald
United States Magistrate Judge